90-163

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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

GARY O. EVERETT,

Petitioner,

vs.

I-NET, INC., and KAVAL R. BAJAJ, and KEN BAJAJ

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 52(a), Federal Rules of Civil Procedure, a district court, sitting without a jury, may enter judgment without setting forth any subordinate facts or stating separately its conclusions of law.

2. Whether a litigant who repeatedly apprises the district court of the action he wishes taken by the district court waives the right to appeal the district court's ruling by not formally excepting to the ruling.

3. In the absence of formal exception, to what extent must a litigant go to make his position known to the district court, sufficient to satisfy Rule 46, Federal Rules of Civil Procedure?

PARTIES BELOW

The names of all parties to the proceedings below appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Coates and Davenport, on behalf of Gary O. Everett, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals, unpublished, appears in the appendix hereto.

The district court rendered no written opinion, but its judgment and amended judgment are set forth in the appendix. To the extent that the district court made findings of fact and conclusions of law, a transcript of the court's comments also appears in the appendix.

JURISDICTIONAL STATEMENT

The order of the district court was entered on March 21, 1989. The amended order of the district court was entered on April 7, 1989. The judgment of the district court was affirmed by the court of appeals on March 26, 1990. Mr. Everett's petition for rehearing and suggestion for hearing in banc was denied on April 20, 1990. Pursuant to Rule 13 of the

Supreme Court of the United States, this petition is timely filed on or before July 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

1. Rule 41(b), Federal Rules of Civil Procedure provides in relevant part (emphasis added):

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

2. Rule 52(a), Federal Rules of Civil Procedure provides in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.

3. Rule 46, Federal Rules of Civil Procedure provides in relevant part:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is

made, the absence of an objection does not thereafter prejudice the party.

STATEMENT

On October 7, 1988, the Petitioner, Gary O. Everett ("Mr. Everett") filed a Complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division, against the Respondents, I-NET, Inc. ("I-NET"), Kaval Bajaj ("Mrs. Bajaj") and Ken Bajaj ("Mr. Bajaj"). Jurisdiction in the district court was founded upon diversity of citizenship, as Mr. Everett was a resident and citizen of the Commonwealth of Virginia; I-NET, Inc. was a Maryland corporation with its principal place of business in Maryland; and the Bajajes were residents and citizens of Maryland. The amount in controversy exceeded the jurisdictional amount of ten thousand dollars ($10,000.00) exclusive of interest and costs. Prior to the filing of

an Answer to his Complaint, Mr. Everett filed an Amended Complaint, seeking, among other things, a partnership accounting, dissolution and winding up, an allocation and distribution of profits and assets of the business known as I-NET, damages for breach of contract and fiduciary duty and the purchase of his interest at fair value or the involuntary dissolution of the corporate defendant, I-NET, Inc. The respondents denied that Mr. Everett was entitled to the relief sought.

This action was tried without a jury on March 20-21, 1989. Prior to the evidence, counsel for the parties and the trial court engaged in a lengthy discussion in which Mr. Everett's counsel repeatedly stated that among Mr. Everett's interests to be determined was his partnership interest. However, despite the Amended Complaint, the

proposed findings of fact and conclusions of law, and the colloquy, the district court ruled it would not consider evidence on Mr. Everett's partnership theory. Having made his position known to the district court, Mr. Everett's counsel made no formal exception to the ruling.

During Mr. Everett's case in chief, the district court heard evidence of how Mr. Everett, an experienced computer designer, programmer, manager and marketer, was induced by the Bajajes to leave his long-standing position with a billion dollar company to assist Mrs. Bajaj in the formation of a neophyte computer information networking system. Mr. Everett was to provide the technical expertise and experience, while Mrs. Bajaj used her gender and ethnic origin (Indian) to qualify under the Small Business Administration's 8A "set aside" program for

minority owned businesses. The trial court heard evidence of the formation of the business, its early days and the successes which Mr. Everett wrought. The trial court also heard evidence of how Mr. Everett gradually was stripped of his rights to participate in the business, of self-dealing on the part of Mr. and Mrs. Bajaj, and of the Bajajes' fraudulent activities.

At the close of Mr. Everett's evidence, the defendants moved to dismiss all of Mr. Everett's counts on the grounds that Mr. Everett was entitled to some shares of stock in I-NET, but nothing more. The trial court agreed, ordering the issuance of the stock and, pursuant to Federal Rule of Civil Procedure 41(b), dismissed all other counts of the Amended Complaint.

Despite the fact that the trial court made its ruling pursuant to Rule 41(b), which

requires the issuance of findings of fact and separately stated conclusions of law, the trial court never made the requisite findings and conclusions. In fact, when Mr. Everett requested clarification of the basis for the trial court's ruling, the trial court explicitly refused to provide an explanation:

> THE COURT: Well, Mr. Coates, [Mr. Everett's counsel] I don't want to give you a short answer, but I think that I have explained my rulings to the extent that I will explain them.

(App. 452)[1]

The district court then entered its final order on March 21, 1989, and entered its amended order on April 7, 1990. Mr. Everett noted his appeal to the United States Court of Appeals for the Fourth Circuit. In its opinion, dated March 26, 1990, a panel of

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[1] Page number references designated as "(A. _____)" are references to the Appendix filed with the court of appeals.

the court of appeals refused to address Mr. Everett's partnership issues on the ground that Mr. Everett somehow had waived his partnership theory prior to trial. Moreover, the court of appeals refused to reverse the trial court on Mr. Everett's corporation issues, citing the trial court's "factual finding" that Mrs. Bajaj had engaged in "no fraudulent or oppressive conduct." Significantly, given the absence of the district court's findings of fact, the court of appeals was unable to recite any facts upon which the district court relied and had to confine its decision on the matter to a single paragraph.

Mr. Everett timely petitioned the court of appeals for rehearing and suggested a rehearing in banc, on the grounds that he had met the standard of Federal Rule of Civil Procedure 46 of putting the court on notice

of his partnership issues, thereby preserving his partnership theory for appeal. Mr. Everett also asserted that the trial court had failed to comply with Federal Rules of Civil Procedure 41(b) and 52(a), requiring specific findings of fact and separate conclusions of law. On April 7, 1990, the court of appeals denied Mr. Everett's petition and request.

REASONS FOR GRANTING THE WRIT

This case presents questions concerning the adherence to and meaning of the Federal Rules of Civil Procedure. The Fourth Circuit Court of Appeals has essentially held that a party's repeated assertions of the theory of his case will be insufficient to preserve that party's ability to pursue that theory on appeal, unless formal exception is taken to an adverse ruling by the district court, Rule 46 notwithstanding. Moreover, both the

district court and the court of appeals' interpretation of the Rules frustrates the purpose of Rules 41(b) and 52(a), which require the issuance of findings of fact and conclusions of law. The disposition of this case represents a departure from these Rules, which are by definition the usual course of judicial proceedings. The failure of this Court to intervene will let stand the injustice wrought by the errors below.

1. While it is beyond cavil that compliance with Rule 46 is mandatory, guidance from this Court as to what constitutes compliance is lacking. To the extent that the respondents can formulate any argument that the district court and court of appeals' rulings comport with the Rules, they have proven that this Court needs to set down more specific guidelines vis-a-vis the application of the Rules. Consequently,

absent further guidance from this Court, neither the lower courts nor litigants nor the bar at large have a basis for insuring that the issues upon which they stake their rights are preserved for review. Despite having pled a partnership theory, having explained the theory in detail in proposed findings of fact and conclusions of law filed with the trial court,[2] and having engaged in a lengthy discussion with the trial court at the outset of the trial which centrally featured partnership theory, Mr. Everett on appeal is informed that his repeated efforts have resulted in waiver. Surely, Rule 46 intended that such effort not be in vain.

Though this Court has never articulated a test by which a litigant may know that he

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[2] Notably, the trial court specifically remarked from the bench that he had read Mr. Everett's trial memorandum (A. 435).

has preserved an issue for appeal, this Court has stated that formal exceptions are unnecessary. In Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S.Ct. 439 (1988), the respondents brought a wrongful death suit against the manufacturers and servicers of a Navy aircraft which had crashed and killed the respondents' decedents. At trial, the petitioners introduced a Navy investigation report containing opinion that the crash had likely been caused by pilot error. On cross-examination, the respondents inquired whether the report also said the most probable primary cause of the crash was loss of power due to equipment malfunction. The petitioners' objection to this question was sustained, and further questions along that line were cut off by the trial court. The respondents never explicitly stated that the point of the inquiry was to prove product

liability nor to impeach the contention that pilot error caused the crash. The respondents made no objection or exception to the ruling.

On appeal, the petitioners in Beech contended that the respondents had waived their right to appeal the trial court's ruling because it was not properly raised in the trial court. This Court rejected that argument:

> [A party] must also comply with Federal Rule of Civil Procedure 46, which requires that a party seeking to preserve an objection to the court's ruling must "mak[e] known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor." Although, as is frequently the case in the heat of a trial, counsel did not explain the evidentiary basis of his argument as thoroughly as might ideally be desired, we are satisfied that he substantially satisfied the requirement of putting the court on notice as to his concern.

488 U.S. at _____, 109 S.Ct. at 452.

In the instant case, Mr. Everett stated repeatedly that partnership issues were to be determined in his action. He had alleged partnership and sought relief under partnership theory in his Amended Complaint; he had pursued his partnership theory in his proposed findings of fact and conclusions of law as filed with the trial court; and he had discussed it at length with the trial court at the beginning of the trial. Notwithstanding this prolonged and consistent effort by Mr. Everett, the trial court foreclosed evidence of partnership theory:

> THE COURT: Well, the only thing relevant in this case is what oppression he has suffered under the corporate status of this organization. That's the only evidence I am going to listen to.

(App. 175) (emphasis added).

In the face of all of Mr. Everett's documented attempts to be heard on his partnership theory, the court of appeals held that, upon the trial court's ruling, supra, Mr. Everett's failure to continue to complain resulted in waiver.

What Mr. Everett now calls upon this Court to do is to provide needed guidance, so that all participants in the judicial process can know --with a certainty -- when an issue has been preserved. Public policy demands that legal criteria be specific, and Mr. Everett respectfully submits that the Court should take this opportunity to draw a bright line, marking that difference between acquiescing in a district court's ruling on the one hand, and putting the court on notice of one's position and then deferring to the authority of the bench, on the other.

As it stands, the only thing Mr. Everett failed to do was to except to the trial court's ruling. However, if that is the test, than Rule 46 is meaningless, and this Court's rule in Beech is a nullity.

2. The other issue in this petition is whether and to what extent Rule 52(a) requires findings of fact and conclusions of law. Rule 52(a), by its own language, is mandatory. Moreover, this Court has explicitly held that compliance with the Rule is mandatory. Commissioner v. Duberstein, 363 U.S. 278 (1960). And, as this Court has stated in Duberstein:

> [I]t is critical here that the District Court as trier of fact made only [a] simple and unelaborated finding . . . To be sure, conciseness is to be strived for, and prolixity avoided, in findings; but . . . there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be.

> Such conclusory, general findings do not constitute compliance with Rule 52's direction to "find the facts specially and state separately . . . conclusions of law thereon. While the standard of law in this area is not a complex one, [we] think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears the District Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive. While the judgment of the court of appeals cannot stand, [we] think there must be further proceedings in the District Court looking toward new and adequate findings of fact.

363 U.S. at 292-93 (emphasis added).

The issue in this case then, is, what constitutes sufficient findings of fact and conclusions of law. This question is especially critical in a case such as this, where the applicable law depends so heavily on the specifics of the facts. The district

court never supported its rulings by setting forth the subordinate facts upon which it relied. Nowhere did it suggest that it rejected Mr. Everett's uncontradicted evidence. The district court certainly did not state separately its "conclusions of law thereon."

For instance, under Valerino v. Little, 62 Md. App. 588, 490 A.2d 756 (1985) the law of Maryland is clear. In Valerino, the Maryland Court of Appeals held that once a minority shareholder presents evidence of self-dealing by a majority shareholder, it is presumed that the actions of the majority are illegal, fraudulent or oppressive. The burden then shifts to the majority to prove the legitimacy of its actions. Until the majority puts forth that evidence, a trial court cannot find against the minority.

In its opinion, the panel characterized the corporate dispute of this case as a "matter of internal corporate management," and stated "[W]e think that most if not all of the actions of which Everett complains would not constitute shareholder oppression." Yet under express Maryland law, these statements are plainly wrong.

In Valerino, the plaintiffs, shareholders in Electra-Mechanical of America, Inc. ("EMA"), filed suit requesting that EMA be dissolved. The plaintiff -- two of whom were members of EMA's board of directors -- alleged and offered evidence that a special board of directors meeting had been held with insufficient notice to the plaintiffs, and that the action taken at the special meeting prejudiced them. Just as in this action, the trial court "found no

evidence of fraud or oppressive conduct" or illegality.

In reversing the trial court, the Valerino Court stated:

> Commingling of funds . . . [has] been held to be sufficiently illegal, oppressive or fraudulent to order dissolution . . . [B]ut, it is not necessary to establish that there has been actual fraud practiced by the party holding the confidential or fiduciary relationship. The proof is upon that director once it is shown that he has dealt in a way to perform in his own interest to show the fairness and adequacy of the transaction. In other words, the burden of going forward shifts . . . If, however . . . appellees were unable to prove the fairness of these [contested] transactions, this self-dealing would allow dissolution.

490 A.2d at 762-63 (emphasis added).

The Maryland Court of Special Appeals reached the same conclusion in Lynch v. Buchanan, 37 Md.App. 413, _____, 372 A.2d 592, 596 (1977) (emphasis added):

> [I]t is not necessary to establish that there has been actual fraud practiced by the party holding the confidential or fiduciary relationship. The proof is upon that director or shareholder once it is shown that he has dealt in a way to perfect his own interest to show the fairness and adequacy of the transaction. In other words, the burden of going forward shifts.
>
> * * *
>
> [T]ransactions between a corporation and its officers or directors are always closely scrutinized and if shown to be unfair or in bad faith will be nullified. The burden of proving that the transaction is fair and equitable falls upon the corporation or director.

Mr. Everett has not relied upon "mere allegations." Uncontradicted evidence, not only from Mr. Everett, but from the defendants themselves, included:

1. Mrs. Bajaj's own deposition testimony and documents introduced at trial, that she wrote hundreds of thousands of dollars worth of checks from I-NET funds to herself. (A.913-1045).

2. Mrs. Bajaj's own deposition testimony and documents introduced at trial, that she used corporate funds to pay her personal charge accounts. (Id.)

3. Mrs. Bajaj's own deposition testimony and documents introduced at trial confirming that she fired Mr. Everett - her partner -, doubled her own salary and hired Mr. Bajaj at a salary of $110,000. (A. 263, 529).

4. Numerous transactions between I-NET and companies and businesses owned wholly or in part by the Bajajes. (A.230-33).

Having established the above facts, Mr. Everett, under Valerino, had proven his case, and the burden then shifted to the defendants to prove the legitimacy of the above transactions. By striking the plaintiff's evidence and ruling for the defendants on this uncontested evidence, it is clear that the trial court fundamentally misapplied the

law. But exactly how the Court applied the law is unclear, since it made no conclusions of law or found the facts upon which that law should be based.

Therefore, this Court should grant certiorari to guide the courts of the federal system and demonstrate the method of compliance with the mandatory Rule 52(a).

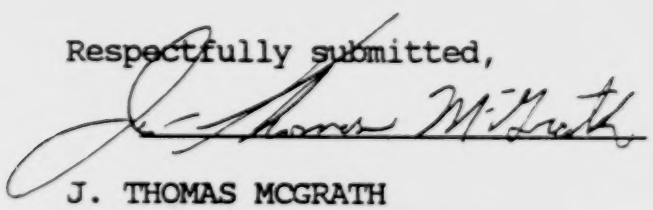
CONCLUSION

On the issue of Rule 46, Mr. Everett repeatedly apprised the district court of the issues to be determined and he did so both in writing and orally. After a sustained discussion, the trial court foreclosed all evidence on partnership issues. Only two courses were open to Mr. Everett: either except to the district court's ruling, or continue with the trial. In reliance upon the express language of Rule 46, he continued with the trial. Now that reliance has

prejudiced him due to the error below. For that reason, and to offer guidance to avoid such error in the future, Mr. Everett asks that this Court grant Mr. Everett's petition.

Likewise, on the issue of Rule 52(a), the district court failed to comply with the Federal Rules and the law of this Court, again with the result of the error being prejudice to Mr. Everett. Consequently, to correct this error and provide needed guidance below, Mr. Everett's petition should be granted.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2082

GARY O. EVERETT,

Plaintiff - Appellant,

versus

I-NET, INC.; KAVAL R. BAJAJ; KEN BAJAJ,

Defendants - Appellees.

No. 89-2082

GARY O. EVERETT,

Plaintiff - Appellant,

versus

I-NET, INC.; KAVAL R. BAJAJ; KEN BAJAJ,

Defendants - Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CA-88-1279-A).

Argued: January 11, 1990
Decided: March 26, 1990

Before ERVIN, Chief Judge, WILKINSON, Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: William Henry Shewmake, COATES AND DAVENPORT, Richmond, Virginia, for Appellant. Henry St. John FitzGerald, REED, SMITH, SHAW & MCCLAY, McLean, Virginia, for Appellees. ON BRIEF: Thomas F. Coates, III, Malcolm P. McConnell, III, A. Richard Thorsey, COATES AND DAVENPORT, Richmond, Virginia, for Appellant. Daniel A. Muser, Karen P. Power, REED, SMITH, SHAW & MCCLAY, McLean, Virginia, for

Appellees.

Unpublished opinions are not binding precedent in this circuit.

See I.O.P. 36.5 and 36.6.

PER CURIAM:

Gary O. Everett appeals from the district court's entry of judgment against him on the motion to dismiss of appellees I-NET, Inc., and Kaval and Ken Bajaj. Everett argues that the district court erred in ruling that he is not entitled to relief under Virginia partnership law or Maryland corporate law. We find that Everett waived his partnership theory before trial. In addition, the factual findings of the district court that Everett was not entitled to relief under Maryland corporate law are not clearly erroneous. We therefore affirm the judgment of the district court.

I.

On January 6, 1985, Gary Everett, Kaval Bajaj, and Mohan Kapani entered into an agreement in Virginia whereby Everett and Kapani each purchased 24.5% ownership in Information Networks Co., a company previously

owned solely by Mrs. Bajaj. She retained 51% ownership in the company. The agreement specified that upon incorporation of Information Networks into I-NET, Inc., Everett would retain ownership in I-NET in the same 24.% share and would share in the profits at that same rate. No other details concerning incorporation were specified in the agreement. The agreement was also contingent on Everett providing marketing and technical expertise to the company.

On February 1, 1985, Everett began work full-time for Information Networks. Unbeknownst to Everett or Kapani, in August of 1985, Mrs. Bajaj incorporated I-NET, Inc. in Maryland and transferred all assets of Information Networks into I-NET. Everett was not given any shares of stock in I-NET at this time, or anything else that would signify his ownership in the corporation. On April 29, 1986, Kapani's interest in I-NET was bought

out by the company, leaving Everett and Mrs. Bajaj as the sole owners of I-NET. There is some dispute as to when Everett actually learned that incorporation had taken place. As early as September or October of 1985, he entered into an employee agreement with I-NET and acted as an officer and employee of the corporation, and he saw and used documents containing the corporate name. He protests, however, that he did not understand the significance in the change of the company's name to corporate form and was unaware of the incorporation until at earliest June, 1986.

According to Everett, after the company's incorporation Mrs. Bajaj entered into a course of conduct intended to exclude him from participation in I-NET's future. He complains among other things that she represented to persons outside the company that she was the company's sole owner, denied him access to the company's books, instructed

company employees not to provide him with financial information, refused to give him an accounting of the company's financial status, and engaged in self-dealing by having I-NET enter into a number of transactions with companies owned in whole or in part by herself or her husband.

Beginning in June of 1986, Everett and Mrs. Bajaj entered into negotiations concerning what type of ownership and ownership rights he would have in the corporation. These negotiations did not prove fruitful, at least in part because Everett demanded that he be guaranteed such things as a seat on the board of directors, a position as an officer of the corporation, and $100,000 in severance pay should he be fired from his current position.

Eventually, Everett filed suit on October 7, 1988, against I-NET and the Bajajes alleging that he was entitled to 24.5% of the

corporate shares of I-NET. On October 18, 1988, he moved for a temporary restraining order to prevent Mrs. Bajaj from firing him and from issuing additional stock and diluting his ownership. The temporary restraining order was granted without notice or a hearing. On October 19, 1988, Everett brought a motion for a preliminary injunction and appointment of a receiver. The motion was denied. The temporary restraining order expired by its own terms on October 21, 1988, and Everett was promptly fired. On October 22 and again on October 25, Everett refused I-NET's proffer of a certificate for 24.5% of the common stock.

On November 16, 1988, Everett filed an amended complaint in which he sought recovery based on the original partnership agreement of January 6, 1985.

The case was tried without a jury on March 20-21, 1989. Prior to trial, appellees

conceded that Everett was entitled to 245 shares of stock in I-NET and that he possessed a right of first refusal on the issuance of any stock that would reduce his percentage ownership. At the conclusion of Everett's case-in-chief, appellees stipulated that Everett was entitled to 245 shares of I-NET stock and moved to dismiss the remainder of his claims under Federal Rule of Civil Procedure 41(b). The district court granted the motion.

Everett appeals.

II.

Everett contends that the agreement of January 6, 1985, established a partnership under Virginia law between Mrs. Bajaj, Kapani, and himself. He maintains that the corporation, I-NET, is now an asset of the partnership, and that a s partner he is entitled to an accounting of the partnership assets and to dissolution of the partnership

and distribution of its assets.

We need not address these contentions because we find that Everett waived his partnership theory prior to trial. In a colloquy between Everett's counsel and the district court prior to trial, the district court questioned counsel about the theory of his case. Counsel was unable to give the court a clear response as to the theory of his case or the relief he was seeking. While at times he mentioned a partnership theory, he later stressed only a theory of shareholder oppression under corporate law. At the conclusion of the colloquy, the district court, after attempting to make sense of Everett's counsel's oblique explanation of his case, stated:

> Well, the only thing relevant in this case is what oppression he has suffered under the corporate status of this organization. That's the only evidence I am going to listen to. And then I am going to listen to your evidence of valuation of the

> corporation. Everett's counsel acquiesced in the court's statement of his case, never protesting that his partnership theory was being overlooked.

Everett maintains that he was unaware that he had waived his partnership theory and only learned that the partnership theory was no longer in the case when the district court granted the motion to dismiss with respect to all counts. This argument is belied by the conduct of Everett's counsel during trial and by his statements in closing argument. While counsel protested several of the court's rulings excluding evidence during trial, never did he indicate that the evidence ought to be admitted in order to provide his partnership theory. Moreover, in excluding evidence as unrelated to the issue of shareholder oppression, the court stated without protest by Everett's counsel that "I thought we determined that the only issue that you are putting on proof about here

today is how oppressive the treatment has been to this minority stockholder that would justify some relief." Nor did counsel ever argue during closing argument that Everett was entitled to recover under a partnership theory.

In what appears to be an argument in the alternative, Everett also contends that the district court ruled against him on the partnership theory in its statement prior to trial that the shareholder oppression theory was the only theory of relevance to the case. When the district court's statement is read in context, however, it is clear that it was not intended to be a rejection of Everett's partnership theory as a matter of law. Rather, in attempting to divine from counsel's confused explanation a coherent theory of Everett's case, the district court indicated that it believed that the shareholder oppression theory was the only

theory presented. Everett's counsel did nothing to dissuade the court from this belief. Thus, in the statements of counsel prior to trial Everett waived any partnership theory he might have had, and he may not raise the issue for the first time at the appellate level. See Singleton v. Wulff, 428 U.S. 106, 120 (1976); Skippy, Inc. v. CPC Int'l, Inc., 674 F.2d 209, 215 (4th Cir. 1982).

III.

Everett also maintains that the district court erred in refusing to dissolve the corporation in accordance with Maryland Code § 3-412(b)(2). That section of the Maryland Code provides that any shareholder entitled to vote may petition a court of equity to dissolve a corporation on grounds that "[t]he acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent." Everett contends that he was

oppressed by Mrs. Bajaj and is therefore entitled to the statutory relief.

We disagree. Everett ignores the fact that the district court heard the evidence he presented and made a factual finding that there was no fraudulent or oppressive conduct on the part of Mrs. Bajaj. The court stated that "[t]here is no evidence at all that this corporation engage din any illegal activity. There also isn't any evidence that there [were] any fraudulent or oppressive acts." There is nothing to lead us to believe that the factual findings of the district court were clearly erroneous. The mere allegations of improper conduct made by Everett during his testimony are insufficient to establish fraud or oppressive conduct.

Much of the conduct on the part of Mrs. Bajaj of which Everett complains, such as awarding herself a large salary and placing him in an isolated office, was a matter of

internal corporate management. In Lynch v. Buchanan, 377 A.2d 592 (Md. Ct. Spec. App. 1977), the Maryland Court of Special Appeals stated:

> "Nothing connected with the normal internal disputes between the shareholders is to be made the subject of a bill by some one shareholder in behalf of himself and others, unless there be something illegal, oppressive or fraudulent -- unless there is something ultra vires on the part of the company, qua company, or on the part of the majority of the company, so that they are not fit persons to determine it."

Id. at 595 (quoting Williams v. ice Co., 3 A.2d 507, 513 (Md. 1939). Similarly, in Toner v. Baltimore Envelope Co., 498 A.2d 642 (Md. 1985), the Maryland Court of Appeals noted:

> "[W]e acknowledge the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. It must a have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate,

> establishing the salaries of corporate officers, dismissing directors with our without cause, and hiring and firing corporate employees."

Id. at 653 (quoting Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976)). Thus, even if the district court had not found as a factual matter that there was no evidence of fraud or oppression, we think that most if not all of the actions of which Everett complains would not constitute shareholder oppression.

IV.

The Bajajes and I-NET cross-appeal, arguing that the district court erred in refusing to grant sanctions against Everett and his attorneys for violation of Rule 11 of the Federal Rules of Civil Procedure. They assert that Everett violated Rule 11 by making false factual representations and by forwarding groundless substantive claims.

This argument is without merit. Our

review of a district court's decision not to impose sanctions is governed by the abuse of discretion standard. See Stevens v. Lawyers Mutual Liability Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986). Here, appellees' complaints of false factual representations center on discrepancies among Everett's initial complaint, his amended complaint, and other motions he filed with the court. However, the representations made by Everett have both a factual and a legal component, and could fairly be considered arguments in the alternative. Moreover, not every claim which fails to persuade a court is a groundless one deserving of Rule 1 sanctions. The district court clearly did not abuse its discretion in declining to impose Rule 11 sanctions in this case.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-2082

GARY O. EVERETT,

Plaintiff -- Appellant

v.

I-NET, INC.; KAVAL R. BAJAJ; KEN BAJAJ

Defendants -- Appellees

No. 89-2093

GARY O. EVERETT,

Plaintiff -- Appellee

v.

I-NET, INC.; KAVAL R. BAJAJ; KEN BAJAJ

Defendants -- Appellants

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of

this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Ervin and Judge Young.

THE COURT: All right. Well, the motion has been made here, and I assume, although it wasn't articulated, I assume that it was a motion to dismiss. And I will construe that motion to be made under Rule 41(b).

There were I believe two issues before the Court in this case. One is a question of the stock that had never been issued. And I am not so sure how that came down in the amended complaint. But in any event, there is a stipulation that this plaintiff owns 243 shares of 245 shares of stock in the corporation.

And I can appreciate the plaintiff's position. It is a very difficult situation to be a minority stockholder in a corporation and work in that corporation and build it up and yet not be able to have the influence to be involved in the operation and the decision making of that corporation.

The evidence is clear that when the plaintiff entered into the agreement to set up the initial partnership, that a corporation was contemplated in that initial agreement. Thereafter a corporation was in fact set up. There was no stock certificate given to the plaintiff, but the evidence before me is that there was considerable negotiation in terms of issuing that stock certificate. And it varies, I haven't counted all the proposals. It was represented by the defendant that there were some 30 proposals that went back and forth. The plaintiff says a number less than that. And I don't think I need to count them or see if some of them are duplicates. The fact remains clear from the evidence the plaintiff has produced that there was a considerable amount of discussion and negotiations that went back and forth about the issuance of those stock certificates.

The plaintiff's evidence also demonstrates that there is no dispute that he owns 245 shares, that he owns 24.5 percent of the total stock of the corporation. And that comes out to some 32 percent of the outstanding shares.

Now, when we get to the question of oppression, apparently the plaintiff is proceeding on two theories. One, a theory in equity, that by showing oppression the Court has equitable powers to deal with the situation. And secondly, that the Maryland statute, 413, also gives certain rights to any stockholder who can show that those in control of the corporation acted in an illegal, oppressive or fraudulent manner.

The evidence in this case does not show any illegal acts. I view this statute to construe illegal acts to be something more than the perfunctory requirement of filings of corporate papers. There are requirements

in all states, at least that I have looked at, that certain filings be made, certain annual filings be made. There are also in those, following those same requirements, remedial kinds of statutes that allow you to go back and to file those and to bring them up to date. Those are really procedural matters that do not amount to what this statute is talking about with illegal acts when they are used in the context of oppressive or fraudulent.

There is no evidence at all that this corporation engaged in any illegal activity. There also isn't any evidence that there was any fraudulent or oppressive acts. The plaintiff has testified that he was not issued the stock certificate as he should have been. That the defendant, Mrs. Bajaj -- It really is unclear from the evidence of whether she told the accountants and bookkeepers that she was the sole owner or

that she simply didn't tell them that he was an owner. Whichever it may be, the records were eventually prepared. There was negotiation over a considerable period of time for the issuance of this stock certificate. The fact that she may have misrepresented to the accountants or failed to tell the accountants, while it may not be the best procedure or perhaps it may have been careless, I don't know, there are a number of words how you could describe it, it certainly doesn't come up to oppressive or fraudulent in the sense that it harmed this plaintiff in any way.

They didn't violate any of his rights. As I understand the rights of a shareholder, it is to be able to vote at the stockholders' meetings, to be able to elect in proportion to the votes that he has the board of directors, who thereafter run the corporation. There was a failure in this

case to have the meetings as they should have been held, and certain information perhaps was not given to him as far as the tax information was concerned. But at the same time that was not given, the evidence is clear that there were continual discussions going on about the issuance of the stock and meetings and discussions daily.

This plaintiff doesn't have sufficient stock to elect a director. Whatever happened to him, in addition to what I have already said, it certainly didn't violate any rights because if they had had the meetings and the plaintiff had been there, he doesn't have enough stock to elect a director in any event.

Under the Maryland statute there are requirements that must be shown. I believe a fair reading of the Maryland law is that a court of chancery simply doesn't have the jurisdiction to decree a dissolution of

the corporation on the petition of a stockholder. That extraordinary circumstances have to be shown. And I believe that Section 413 sets out those extraordinary circumstances. And those, as I have said, simply have not been shown.

In any event, I believe that the Maryland statute only provides for dissolution. And I would find in this case that dissolution would not be a remedy for the plaintiff. This is a service corporation. The testimony is it doesn't have any assets. If you dissolve it, the plaintiff cannot be made whole in any event. I don't believe that really is a practical remedy.

For the reasons stated I will grant the defendants' motion to dismiss this as it related to the question of oppression and the request for dissolution and valuation of the stock.

That leaves only one matter. This plaintiff is entitled to have a stock certificate in this corporation in the amount of 245 shares. And you have already stipulated to that. And you, I am sure, would not have any objection to my entering an order that such stock certificate is conveyed to him forthwith.

MR. FITZGERALD: Correct, Your Honor.

MR. COATES: Your Honor, is the Court -- The Court is granting the motion, I take it, with respect to all counts of the plaintiff in the case?

THE COURT: To all counts except for your conveyance of the 245 shares, which will come forthwith.

MR. COATES: Is the Court's position as to the plaintiff not having suffered anything, would it relate also as well to the lack of, to the lack of the

plaintiff's sharing in the profits and losses as a shareholder in an S corporation during the intravening period?

THE COURT: Well, Mr. Coates, I don't want to give you a short answer, but I think I have explained my rulings to the extent that I will explain them.

And if we have no further business, we will adjourn until tomorrow morning at 9 o'clock.

HEARING CONCLUDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

MAR 21 1989
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VA.

GARY O. EVERETT,
Plaintiff,

v. 88-1279-A

I-NET, INC., KAVAL R. BAJAJ,
and KEN BAJAJ,
Defendants.

ORDER

For reasons stated from the bench, it is hereby,

ORDERED that judgment is entered for the plaintiff for the stock representing his interest in the corporation and that defendant I-NET, Inc. shall forthwith convey to the plaintiff a certificate for 245 shares of I-NET, Inc. stock.

Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 21, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

GARY O. EVERETT, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 88-1279-A
I-NET, INC., KAVAL R. BAJAJ, and KEN BAJAJ, Defendants.	)	

AMENDED ORDER

This matter came on to be heard on plaintiff's motion to amend the judgment order. For reasons stated from the bench, it is hereby,

ORDERED that plaintiff's motion is GRANTED and that plaintiff is now and has been the owner of 245 shares of I-NET, Inc. since the date of incorporation. Defendant I-NET, INC. shall forthwith convey to plaintiff a certificate for 245 shares of I-NET, Inc. stock.

Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
April 7, 1989

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operated as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant

of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof, For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other

than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exemption has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of this action. Request for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings an may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.